2001

The State of Utah v. Wintron Nunez : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
WINTRON NUNEZ,	:	Case No. 20010019-CA
Defendant/Appellant.	:	Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment of conviction for unlawful distribution, offering, agreeing, consenting or arranging to distribute a controlled or counterfeit substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Roger A. Livingston, Judge, presiding.

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TABLE OF AUTHORITIES

Page

CASES

STATUTES

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). The Honorable Roger A. Livingston, Judge, Third District Court, Salt Lake County, State of Utah, entered judgment of conviction for unlawful distribution of a controlled substance in a public park, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2000). R. 123. A copy of the judgment is in Addendum A.

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue. Whether the trial court committed reversible error in refusing to instruct the jury on the lesser offense of attempted possession of a controlled substance which was requested by the defendant in support of his defense?

Standard of Review. The trial judge's refusal to give a lesser offense jury instruction requested by the defense involves a legal question which is reviewed for correctness. State v. Simpson, 904 P.2d 709, 711 (Utah App. 1995).

Preservation. This issue was preserved at R. 147:91, 160-69, a copy of which is in Addendum B.

TEXT OF RELEVANT STATUTES

The text of the following statute is in Addendum C:

Utah Code Ann. § 58-37-8 (Supp. 2000).

STATEMENT OF THE CASE

On June 20, 2000, the state charged Defendant/Appellant Wintron Nunez ("Appellant" or "Nunez") with one count of "unlawful distribution, offering, agreeing, consenting or arranging to distribute" a controlled substance in a public park, a second degree felony. R. 7-8. A jury trial was held on October 24, 2000. R. 147. The jury convicted Nunez as charged. R. 84. Following sentencing on December 4, 2000, Nunez filed a timely notice of appeal on December 15, 2000. R. 125.

STATEMENT OF THE FACTS

On June 14, 2000, Salt Lake City Police Officer Tyrone Farillas was working in the Pioneer Park and shelter area of Salt Lake City. R. 147:94-5. Officer Farillas, who had been a police officer for three years, was working undercover. R. 147:94-5. He wore a wire and was working with six other officers who were not undercover. R. 147:96, 112.

During the 3:00 p.m. to 1:00 a.m. shift that the team worked on June 14, 2000, Officer Farillas and the others made eight to nine arrests. R. 147:96, 110. Farillas was

the undercover officer in each of those arrests and wrote reports for each arrest. R. 147:110. Farillas could not remember whether the incident in this case was the first undercover buy he attempted to make that evening. R. 147:111. He also was unclear as to the time at which this occurred, initially testifying that it was around 8:00 p.m., but later acknowledging that his report showed it was 5:03 p.m. R. 147:103, 112.

After Officer Farillas walked into the northwest corner of Pioneer Park, he was approached by a black male, Claude Ryans, Jr., who asked undercover officer Farillas whether Farillas had any "mota." R. 147:97, 103. "Mota" is a term used to refer to marijuana. R. 147:97.

Farillas and Ryans were together by themselves for three minutes. R. 147:98. They then saw another black male, Appellant, walking on 300 south towards the park. R. 147:98.

The pair made contact with Nunez, and Ryans asked Nunez for some mota. R. 147:98. Farillas testified that Appellant said, "I don't have any, but I can - I can - I can find it for you." R. 147:99. Farillas then told Nunez that he, too, was looking for mota. R. 147:99. Nunez said, "follow me." R. 147:99.

The trio walked westbound on 300 South. R. 147:99. Farillas told Nunez that he wanted $20 worth of marijuana. R. 147:99. Ryans said he was looking for $10 worth of marijuana. R. 147:100.

Nunez told the pair he had a friend at the shelter named Steve who could probably hook Ryans and Farillas up with some marijuana. R. 147:100. Nunez, Farillas and Ryans walked to the shelter, which the officer testified was within 1000 feet of the park. R. 147:101. Nunez told Ryans and Farillas to wait while Nunez got his friend, Steve. R. 147:101. Nunez returned without Steve and told Ryans and Farillas that Steve had run out of marijuana that morning. R. 147:102.

Nunez told Farillas and Ryans that he knew another guy who might have marijuana, and told the pair to follow him again. R. 147:102. They walked back toward the Salvation Army food line where the other person often hung out. R. 147:102. The other person was not at the food line, however. R. 147:104.

Nunez told Farillas and Ryans to follow him back into the park. R. 147:104. They walked side by side, three abreast, to the northwest corner of the park, where they saw a white female. R. 147:104, 121. Ryans was closest to the female and Farillas the farthest away from her. R. 147:122. According to the officer, Nunez and the female talked for a maximum of thirty seconds, while the officer and Ryans stayed back about ten feet away. R. 147:104, 117. Farillas could not hear anything they said. R. 147:105. Nunez then said, "follow us" and they followed Nunez and the female back to the food line. R. 147:104.

The female, Rebecca Hellman, motioned Farillas and Ryans to sit by her. R. 147:104, 151. She said, "How much are you looking for?" R. 04. Farillas said, "20."

R. 147:104. Prior to that, Farillas had not talked with the female nor indicated to her that he wanted to buy marijuana. R. 147:110.

Hellman took two baggies of marijuana from her sock and handed them to Farillas. R. 147:104. Farillas gave her $20, then got up and walked over to Appellant, who was standing about four feet away. R. 147:104. Nunez wanted some of the marijuana, and told Farillas to wait for him. R. 147:104, 109. Farillas observed Ryans give the female a $10 bill while waiting for the arrest team to arrive. R. 147:106.

Farillas acknowledged that throughout this incident, he, Nunez and Ryans "were just kind of hanging out together." R. 147:123. The atmosphere was not businesslike. R. 147:123. When Nunez and Hellman began talking, there was no indication that they knew each other. R. 147:124.

Farillas stated that it was a "done deal," which told the officers who were listening over the wire that a transaction had taken place. R. 147:105. The officers arrived and arrested everyone, including Farillas. R. 147:117. Ms. Hellman slipped out of her handcuffs and ran. R. 147:119.

Claude Ryans testified that on June 14, he picked up his paycheck then went to Pioneer Park to look for some marijuana. R. 147:145. He approached a group which included Nunez and asked whether they knew where he could find some marijuana and that he would give them a joint if they helped him find some. R. 147:146. Nunez told Ryans he did not smoke marijuana, then the group went looking for some marijuana.

R. 147:146. Ryans did not know Nunez before that day. R. 147:146.

Nunez testified that Officer Farillas approached him and Ryans and asked whether they knew where to find marijuana. R. 147:150. Nunez responded, "I don't know." R. 148:150. Nunez also told Farillas that he had a friend named Steve who usually had marijuana. R. 147:150. Farillas, Ryans and Nunez looked for Steve but could not find him. R. 147:150. They walked back towards the park and Hellman approached them. R. 147:151. Nunez testified that he did not talk with Hellman. R. 147:151. Instead, she asked the three what they were looking for. R. 147:152. Farillas responded that he was looking for twenty dollars worth of marijuana. R. 147:152. Ryans, Hellman and Farillas then made their transactions. R. 147:154. Nunez was not involved and was not watching what happened. R. 147:154.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in failing to instruct the jury on the lesser offense of attempted possession of a controlled substance, as requested by the defendant. When a defendant requests a lesser offense instruction, due process is violated by the failure to give such an instruction where (1) the charged offense and the requested lesser offense have overlapping elements, and (2) the evidence viewed in the light most favorable to the *defense* demonstrates a rational basis for acquitting the defendant of the charged offense and convicting him of the lesser offense. In this case where both of these requirements were met, the trial court violated Appellant's right to due process and

committed reversible error in refusing to instruct the jury on attempted possession of a controlled substance.

ARGUMENT

POINT. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO INSTRUCT THE JURY ON ATTEMPTED POSSESSION OF MARIJUANA, A LESSER INCLUDED OFFENSE INSTRUCTION REQUESTED BY THE DEFENSE IN SUPPORT OF ITS THEORY OF THE CASE.

The defense requested that the trial judge instruct the jury on attempted possession of marijuana. R. 147:91, 160-66. The trial judge denied the motion, reasoning that the defense was not entitled to that lesser included instruction because "there are no facts upon which, in my view, a jury would render that verdict." R. 147:169. In refusing to instruct the jury on the defense theory of the case, the trial judge committed reversible error.

Different concerns exist when the defendant requests a lesser included offense instruction than when the prosecution requests such an instruction. See State v. Carruth, 1999 UT 107, ¶6, 993 P.2d 869. When the prosecution requests a lesser instruction, all of the elements of the lesser crime must necessarily be included in the crime charged in order to give the defendant notice. State v. Baker, 671 P.2d 152, 155 (Utah 1983). By contrast, the concern when the defendant requests a lesser instruction is that the defendant be given the "full benefit" of the proof beyond a reasonable doubt standard. Carruth, 1999 UT 107, ¶6 (quoting Baker, 671 P.2d at 156.) Accordingly,

> when the defendant requests a lesser included offense instruction, the standard is somewhat different. In that situation, there must be some overlapping of the statutory elements of the offenses. If that overlapping exists and the evidence is ambiguous and susceptible to alternative interpretations, the trial court must give a lesser included offense instruction if any one of the alternative interpretations provides both a "rational basis for a verdict acquitting the defendant of the offense charged *and* convicting him of the included offense."

State v. Oldroyd, 685 P.2d 551, 553-54 (Utah 1984) (citations omitted).

While a defendant's right to a lesser included offense instruction is not absolute or unqualified, it nevertheless requires a lesser included offense instruction under less stringent standards than are required when the prosecution requests a lesser instruction. See Baker, 671 P.2d at 157-58. Moreover, due process requires that such an instruction be given when the evidence warrants it. Id. at 157 (citations omitted).

Hence, when a defendant requests a lesser included offense instruction, such an instruction must be given when (1) the offense is included in that at least some of the statutory elements overlap, and (2) there is a "'rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.'" Baker, 671 P.2d at 159 (citing Utah Code Ann. § 76-1-402(4) (1953 as amended)). In discussing the second aspect of this test, the Utah Supreme Court stated:

> This standard does not require the court to weigh the credibility of the evidence, a function reserved for the trier of fact. The court must only decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury, a decision which must be made concerning all jury instructions in any trial. When the elements of two offenses overlap . . . if there is a sufficient quantum of evidence to raise a jury

> question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense. Similarly, when the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser, a jury question exists and the court must give the lesser included offense instruction at the request of the defendant This situation will often arise when the critical question is either the credibility of certain evidence or the determination of what inferences may legitimately be made on the basis of the evidence.

Baker, 671 P.2d at 159. In the present case, both aspects of the relevant test were met and the trial court's failure to give Nunez's requested instruction on the lesser offense of attempted possession of marijuana therefore violated due process.

First, the statutory elements of distribution of marijuana and possession of marijuana overlap. The statute under which the state charged Nunez makes it unlawful to "distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance." Utah Code Ann. § 58-37-8(1)(a)(ii) (1998). The Information and instruction to the jury likewise included as an element distributing, offering, agreeing, consenting or arranging to distribute a controlled substance. R. 7, 94. Since distribution requires possession of the controlled substance, the elements for a charge of distribution of marijuana pursuant to section 58-37-8(1)(a)(ii) and possession of marijuana pursuant to section 58-37-8(2)(e) overlap. Morever, since arranging involves anticipation of possession, as does an attempt to possess, the two statutes overlap.

Second, the evidence in this case supports giving a lesser included instruction on the offense of attempted possession since it provided a basis for acquitting Nunez of distribution and convicting him solely of attempted possession. In assessing that evidence, this Court does not weigh the evidence or consider whether there was credible evidence to support a conviction. Oldroyd, 685 P.2d at 555. Instead, this Court must consider the evidence in the light most favorable to the defendant. Id.

The defense in this case was that Nunez did not "arrange" a drug deal. Instead, Nunez, Ryans and Farillas were simply hanging out and "all went on a search together." R. 147:211.

The evidence supported this defense and provided a basis for acquitting Nunez of arranging the distribution of marijuana. Officer Farillas and Ryans hooked up in Pioneer Park and Ryans asked the officer whether he had marijuana. R. 147:97, 103. They then made contact with Nunez and asked him for marijuana. R. 147:98. Nunez did not have marijuana but thought he could find Steve, who often had marijuana. R. 147:99. The trio then ambled around the Pioneer Park/shelter area, looking for Steve or someone else who sometimes had marijuana. R. 147:99-100. The trio did not find Steve or the other person.

After wandering around for awhile, the three headed back toward Pioneer Park. Officer Farillas acknowledged that throughout this encounter, Nunez, Ryans and Farillas were "just kind of hanging out together" and that the atmosphere was not businesslike. R. 147:123. After the trio returned to Pioneer Park, they hooked up with Hellman.

Nunez testified that he never talked with Hellman. R. 147:151. Instead, Hellman asked the three what they were looking for, and Farillas responded that he was looking for twenty dollars worth of marijuana. R. 147:152. Farillas and Ryans talked with Hellman without Nunez and made the deal on their own. R. 147:152, 154. Nunez wanted to share some of the marijuana and told Farillas to wait after Farillas made his deal with Hellman. R. 147:104, 109.

In assessing whether the trial court was required to give the defendant's requested instruction, this evidence must be viewed in the light most favorable to the defense. Oldroyd, 685 P.2d at 555 (citing State v. Crick, 675 P.2d 527 (Utah 1983)). Since Nunez merely hung out with the officer and Ryans while the three wandered around and vaguely tried to locate some marijuana, the jury could have found that Nunez's actions did not rise to the level of "arranging" a drug deal. Moreover, Nunez testified that he did not talk with Hellman and there was testimony that Nunez did not previously know Hellman. Looking at the evidence in the light most favorable to the defense, the jury could have determined that although Nunez hung out with the officer looking for someone who might have marijuana, he did not arrange the deal with Hellman because he did not speak to her.

The evidence, viewed in the light most favorable to the defense, likewise provided a rational basis for convicting Nunez of the lesser charge. Farillas, Ryans and Nunez wandered around looking for someone with marijuana. When Farillas made his deal,

Nunez immediately told him to wait so that Nunez could share the marijuana. R. 147:104, 109. Given this evidence, the jury could reasonably have found that Nunez did not arrange a deal but instead was hanging out with Farillas and Ryans in the hope that he would get some marijuana. Accordingly, there was a rational basis for convicting Nunez of the lesser offense of attempted possession of marijuana.

A trial court's error in failing to give a lesser instruction requested by the defense requires a new trial. See Oldroyd, 685 P.2d at 556 (reversing conviction and remanding for new trial where trial judge erred in failing to give defendant's requested instruction). Reversal is required because the failure to give a defendant's lesser instruction deprives the defendant of the benefit of the reasonable doubt standard, thereby depriving the defendant of a fair trial. See id. (citing Baker, 671 P.2d at 157). In this case where the trial court failed to instruct the jury on the lesser offense of attempted possession of a controlled substance, as requested by the defendant, Appellant's right to due process was violated and a new trial is required.

CONCLUSION

Defendant/Appellant Wintron Nunez respectfully requests that this Court reverse his conviction and remand his case for a new trial.

RESPECTFULLY SUBMITTED this 15th day of May, 2001.

Joan C. Watt

JOAN C. WATT
DEBORAH KREECK MENDEZ
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 15th day of May, 2001.

Joan C. Watt

JOAN C. WATT

DELIVERED to the Utah Court of Appeals and the Attorney General's office as indicated above on this _____ day of May, 2001.

_____

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT-SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 001910707 FS
WINTRON DAVID NUNEZ, Defendant.	:	Judge: ROGER A. LIVINGSTON Date: December 4, 2000

PRESENT
Clerk: ginam
Prosecutor: JEFF HALL
Defendant
Defendant's Attorney(s): DEBORAH KREECKMENDEZ

DEFENDANT INFORMATION
Date of birth: April 26, 1961
Video
Tape Count: 11:17

CHARGES

1. DISTRIBUTE/OFFER/ARRANGE TO DIST C/S - 2nd Degree Felony
Plea: Not Guilty - Disposition: 10/24/2000 Guilty

SENTENCE PRISON

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE TO DIST C/S a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Case No: 001910707
Date: Dec 04, 2000

SENTENCE JAIL

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE TO DIST C/S a 2nd Degree Felony, the defendant is sentenced to a term of 365 day(s)

Credit is granted for time served.
Credit is granted for 163 day(s) previously served.

SENTENCE JAIL SERVICE NOTE

C/o deft to serve 1 year in jail, cts, concurrent. Deft may be released for extradition to California.

ORDER OF PROBATION

The defendant is placed on probation for 3 year(s).
Probation is to be supervised by GOOD BEHAVIOR PROBATION.
Defendant to serve 365 day(s) jail.

Defendant is to pay a fine of 0

PROBATION CONDITIONS

Violate no laws.

Dated this 4 day of December, 2000.

ROGER A. LIVINGSTON
District Court Judge

ADDENDUM B

MS. WISSLER: — "we further do or do not find that this offense took place in or within 1,000 feet of public park."

MS. KREECK-MENDEZ: And, your Honor, I am going to ask that a lesser included — and we can't decide that till the evidence is in, but the lesser included attempted possession of a controlled substance. And so we'll need a special verdict form for that, your Honor.

THE COURT: Attempted possession or attempted distribution?

MS. KREECK-MENDEZ: Attempted possession.

THE COURT: A Class C?

MS. KREECK-MENDEZ: A Class C misdemeanor. But it would be — then there would need to be the special verdict to enhance it to — for being in the park.

THE COURT: Okay. All right. Let me say this. Can you by 4:00 o'clock have a verdict form that you want —

MS. KREECK-MENDEZ: Uh-huh. (affirmative)

THE COURT: — and whatever. I don't think I can delegate that to Gina to have done because we don't know what exactly that you're going to do. So I'm just giving you heads up.

MS. KREECK-MENDEZ: That's fine.

THE COURT: We're not going to do verdict forms.

MS. KREECK-MENDEZ: Okay.

MS. WISSLER: Judge, also I have a special verdict form which you asked us to prepare.

THE COURT: Oh, great. Okay.

MS. WISSLER: And I understand that there's no objection to this form.

MS. KREECK-MENDEZ: There's no objection to that, and then mine is coming in.

THE COURT: Okay.

MS. KREECK-MENDEZ: I guess we need to deal with the issue.

THE COURT: And we'll let Ms. Wissler look at that and see what she wants to do. Okay. You guys all be seated, if you want, just a moment. Is it all right to talk about that now, or do you want to wait till the verdict form comes over? I think we can talk about it on its way, can't we?

MS. KREECK-MENDEZ: I think we can discuss it.

THE COURT: Let me — you know —

THE CLERK: Is this on the record?

THE COURT: Sure. You'd better put this on the record, 'cause Ms. Kreeck-Mendez may not like what I have to say.

MS. KREECK-MENDEZ: I wouldn't at all.

THE COURT: And that is, while it is generally true, it seems to me, that in any distribution case, or offering or arranging case, you have the lesser included of possession. I

think that is ipso facto true in 99 percent of the fact patterns. It seems to me in this particular case there is no evidence that Mr. Nunez possessed marijuana, or indeed that he attempted to possess it.

As I understand the State's evidence — and I take it in the light most favorable to the State at this point — that what they have is evidence that Mr. Nunez facilitated the distribution of marijuana from another party to this undercover officer, but he never either possessed — had in his control or dominion — a substance [unintelligible] marijuana, nor did he ever attempt to.

In other words, the facts are different than him taking it from party A and giving to party B. I just think that the State's case is one of facilitation, introduction, and here's the — I know where a buyer is and I know where a seller is, and here are you two guys, and they consummated the deal. And I just don't know if there's any evidence upon which the jury could reasonably find that Mr. Nunez either possessed or took a substantial step toward possessing it himself.

So it's not as a theoretical matter that I have any problem with it, and I think that 99 percent of time I would grant the motion to have a lesser included, but I just don't see how it fits the facts of this case, and I'd be curious to hear how you think it does.

MS. KREECK-MENDEZ: Your Honor, I think it fits the

facts clearly because Officer Farillas, by the State's own evidence — let's just work with what the State presented — testified that Mr. Nunez asked to use the marijuana. This was merely a way for him to get some marijuana, by the State's case —

THE COURT: Oh.

MS. KREECK-MENDEZ: — to use. He was in no benefit. His only benefit is he says, "Hey, wait for me. I want to share with you." I think you can take it one step further where you have Mr. Ryans saying, he says, "Well, I'll give you a joint or I'll give a beer. I'll share with you."

But I think — I think the jury has the evidence before it, by Officer Farillas's own testimony, that Mr. Nunez was merely trying to help him get the drugs so he could attempt it to possess himself. He didn't actually get to possess it because the officers arrested them. But his intent, had Mr. Farillas not been a police officer, was that all three of them were going to sit down and use it.

That's what Officer Farillas testified, and I think that is a substantial piece of evidence. It's the State's evidence, and I think that at least the jury should be able to have the instruction to decide if this wasn't merely just an attempt to possess on his own behalf.

THE COURT: Let me just ask one other question, then.

MS. KREECK-MENDEZ: Uh-huh. (affirmative)

THE COURT: You know, it seems to me the State could have charged, based upon the – certainly they could have charged, in addition to the offering or arranging, they could have charged a C, attempt to possess, because after one crime was committed and that's a consummated deal, then he, in addition to that, attempts to possess some himself.

So I'm not – let me just pare back what I think I heard you say, and that is that in addition to the State claiming that he facilitated the transaction from A to B, once B had the stuff, he tried to get B to share it with him. I'm not sure. Because that's an uncharged crime, do you get to have that be a lesser included of the main crime where there's no facts upon which the jury could reasonably find that in lieu of the main?

I guess what I'm saying is, is it possible that a jury could disbelieve the first part of the officer's testimony, but then, I guess, believe an aside that's not even charged?

MS. KREECK-MENDEZ: Well, I think it goes to knowing – the knowing and intentional. What was – what did Mr. Nunez intend to do here? Facilitate a distribution, or facilitate his possession? And it kind of goes back to my oral arguments.

Mr. Ryans wasn't even charged in this matter. The State had a choice. They had some choices here. One was they

could have gone with city ordinance that we argued – that I had filed a motion on. Here, it goes to his intent. And I think, clearly, the jury gets to decide. Was he intending to aid in a distribution? Was he intending to get his own drugs here?

And I think that Officer Farillas's testimony puts in issue, factually –

THE COURT: Okay.

MS. KREECK-MENDEZ: – what his intent was.

THE COURT: Let me ask it one other way, just so I understand your position. And that is, what if it is true his subjective intent, in introducing A to B, is so that he gets some of the drugs that B gets? How does that negate the fact, if the jury finds that, that he in fact facilitated, assisted, arranged, the transfer of A to B? The fact that not only was he an entrepreneur, but now he wants to share in the proceeds.

I'm not sure why – lesser included means he didn't do the higher; he only did the lower.

MS. KREECK-MENDEZ: It goes to intent, your Honor. What was his intent here? Was his intent to aid, or was his intent to attempt to possess? And I think that clearly we have enough evidence that the jury needs to decide that. What was his intent? That's the key issue here.

THE COURT: Okay. Well, let just paraphrase. I want to make sure I'm hearing you. What I think I really hear you saying is – with all respect to you. And I think you might be

confusing, or wanting me to confuse, motive and intent. What I think I hear you saying is, his real motive of this was to get some pot to smoke himself.

And if that's his motive, that's okay, but I'm not sure, because that's his underlying motive, that that negates the intent of "Hi, A, this is B. B, this is A. I think you guys ought to" — you know, he brings them together, the intent meaning that he intentionally — volitionally engages in conduct to facilitate the transfer of drugs.

The fact that his subjective desire or motivation in all of this is so he gets some marijuana to smoke too, I really think I hear what — what I really think I hear you saying is that this is his motive, but that's different than intent. So that's kind of —

MS. KREECK-MENDEZ: See, my opinion is that motive — it doesn't — motive is not the issue here. So I am saying it's intent. What is his intent? His intent here is to acquire marijuana.

THE COURT: Yeah. Intent really goes to the voluntariness of the act.

MS. KREECK-MENDEZ: Well, I think it goes to what he — was he intentionally seeking to aid and abet? No. He was intentionally seeking to acquire marijuana.

THE COURT: Okay.

MS. KREECK-MENDEZ: I mean not aid and abet.

THE COURT: I understand your position.

MS. KREECK-MENDEZ: Was he intentionally seeking to aid?

THE COURT: Well, let's see, first of all, maybe Ms. Wissler's not objecting, and I'm just tilting at windmills. Do you want the lesser included instruction or not?

MS. WISSLER: No, Judge, I don't. And I think —

THE COURT: Tell me why it stays out.

MS. WISSLER: Because I don't there's any factual basis for it. I think that your Honor has hit the nail right on the head, and you, I don't think have said it as emphatically as I will. I don't think this is a situation where this is a lesser included. This is not an "or," it's an "and." The fact of the matter is, I think the Court's right, that we could have charged an additional offense here.

But the fact is that by the time Mr. Nunez had made this expression of his desire to share in this marijuana, the offer, arrange, agree was a completed offense. It had already taken place. The statute does not require that the transaction come to fruition. It doesn't require that any drugs or money change hands, only that he offer or arrange or agree to distribute a controlled substance.

That offense occurred long before the transaction. In fact, it had occurred several times before the transaction had ever been completed. So if it's true that the factual

basis for the Class C misdemeanor is in his expression of his desire "Hey. Now that I've helped you out, can I have some of that," that's a separate offense.

It's not a lesser included. It's a separate occurrence which has not been — it's a separate criminal offense which has not been charged, and I think it's inappropriate, as a matter of law, to give an instruction in that regard, given the fact that there is a higher — we have the reverse *Shondel* problem.

I mean it's like charging an assault on a homicide case. When you have a homicide, you necessarily have an assault. When you have an offer, arrange, agree, you necessarily have an attempted possession in most circumstances.

But I agree with the Court that this situation is different, and it's different for several reasons. First of all, by the defendant's own testimony, or at least his claim is from the stand today, he never intended to get any marijuana for himself. He claims, and he claimed from the stand, that all he did was take this officer over to this guy named Steve. Steve didn't have any marijuana, and that was it, and that was the end of the story.

But we never had any testimony or any discussion about marijuana changing hands from a seller to Mr. Nunez to the officer; we just had the defendant acting as an intermediary. So he never actually intended to possess it

himself. He was simply facilitating a transaction between two other people.

So I think the attempted possession is a legal fiction in the truest sense. It didn't happen. He never — by his own testimony, he never attempted to possess it himself. He attempted to facilitate a transaction, and did facilitate a transaction, between any one of four people and this officer, and kept trying until it actually occurred.

So I think the problem is that this instruction, and the factual basis that the defendant is alleging for the instruction, is simply a non-charged additional offense. And I think, under the circumstances, it's inappropriate to give that instruction because it hasn't been charged.

THE COURT: Anything else, Ms. Kreeck-Mendez?

MS. KREECK-MENDEZ: Just one point. This isn't a reverse *Shondel*, or you would have got a motion that said —

THE COURT: Yeah.

MS. KREECK-MENDEZ: — attempted possession of a controlled substance, but the facts are different. But they are lesser; they're just slightly different. And they're lesser, just doesn't quite reach to that level that it would be a *Shondel*.

And then it's a question of fact for the jury to decide what Mr. Nunez said as opposed to what Officer Farillas says, that clearly there are both facts, though, here for the

jury to decide from.

THE COURT: Thank you. At this time, I'm going to deny the motion for the separate special verdict form and the lesser included. In no way am I suggesting that Ms. Kreeck-Mendez cannot, and I'm sure she ably will, argue to the jury reasonable doubt as to intent.

And you can certainly argue, you know, whatever you want to regarding the issue that he didn't have, in your view, the mens rae and the evidence failed to present a reasonable doubt that there was not an intent to facilitate a transfer of drugs, but rather an intent to possess it himself.

That's certainly a position that in no way am I restricting you to argue from the jury that — you're certainly entitled to argue the State has not met its burden of proof. But in my view you are not entitled to have a lesser included, I don't think, of attempted possession because it simply — there are no facts upon which, in my view, a jury could render that verdict.

And I guess again it goes to the point that the law seems to criminalize conduct on the facilitator, who is outside the loop in the sense of not attempting to possess it himself, but merely arranging for the transfer between two other parties, and it seems to me that's a fair characterization of the State's claim in this case.

I wonder what would be the most efficient in terms

ADDENDUM C

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II or a controlled substance analog is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this chapter;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place

knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person, that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (2)(a)(iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (4)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i) through (viii); or

(x) in the immediate presence of a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(7) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(8) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(9) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(10) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.